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In The

Supreme Court of the United States

NOV 13 2000

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS,

Petitioners,

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF THE CAMPO BAND OF MISSION INDIANS, EASTERN SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, LUMMI NATION, PUEBLO OF SAN FELIPE, AND ZUNI INDIAN TRIBE SUPPORTING PETITIONERS

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BRIEF *AMICI CURIAE* OF THE CAMPO BAND OF MISSION INDIANS, EASTERN SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, LUMMI NATION, PUEBLO OF SAN FELIPE, AND ZUNI INDIAN TRIBE SUPPORTING PETITIONERS

Pursuant to Sup. Ct. R. 37, the Campo Band of Mission Indians of California, the Eastern Shoshone Tribe of the Wind River Reservation of Wyoming, the Lummi Nation of Washington, the Pueblo of San Felipe of New Mexico, and the Zuni Indian Tribe of New Mexico and Arizona file this brief *amici curiae* in support of the Petitioners in the above-entitled case. Petitioners, the United States Department of the Interior and the Bureau of Indian Affairs, and Respondent, Klamath Water Users Protective Association, have consented in writing to the filing of this brief.[1]

INTEREST OF *AMICI CURIAE*

The Campo Band of Mission Indians is descended from the Kumeyaay people, who have inhabited what is now southern California and northern Mexico for more than 2,000 years. The Band's Reservation was established by Executive Order in 1893. *See* Act of Jan. 12, 1891, ch. 65, 26 Stat. 712. The Reservation is located approximately fifty miles east of the city of San Diego in the Cuyamaca and Laguna Mountains. The southern boundary of the

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

Reservation is less than a half-mile north of the border between the United States and Mexico.

For centuries, the Kumeyaay migrated throughout the region to take advantage of the abundant natural resources. In an area notable for its lack of rainfall, surface water, wetlands, and numerous small springs were surprisingly plentiful. That changed with the arrival of European settlers. In less than a hundred years, shortsighted grazing, water management, and agricultural practices drastically altered the natural landscape.

Today, the Band's economy is built upon the Reservation's natural resource base and employment opportunities provided by the tribal government. In the future, the Band hopes to exploit its proximity to the booming economic centers of San Diego and Tijuana, Mexico, to develop its commercial and industrial potential. The availability of water will go a long way toward determining whether the Band's endeavor succeeds or fails. Although it is likely that the Band possesses senior rights to the waters of Campo Creek and the Reservation's groundwater supply, those rights have never been quantified. As economic development in the area increases, so too will competition for the area's limited water resources. Because of these development pressures, a water rights adjudication or a negotiated settlement of the tribal claims will become inevitable. In either case, the United States will be obligated to assert and protect the Band's right to water. Because the Band is the only source of information regarding its historical and planned future use of water, the United States will have to consult with the Band to obtain that information, which will be absolutely vital to the establishment of the Band's water right.

The Eastern Shoshone Tribe inhabits the Wind River Reservation in west central Wyoming. The Tribe entered into a Treaty with the United States in 1868. Treaty between the United States and the Eastern Band of Shoshonees and the Bannack Tribe of Indians, July 3, 1868, 15 Stat. 673. The Tribe's natural resource holdings, held in trust for it by the United States, are extensive. In addition to the Tribe's water rights, which were confirmed by this Court in *Wyoming v. United States*, 492 U.S. 406 (1989), the 2.2 million acre Reservation contains rich deposits of oil, gas, coal, gravel, gypsum, and bentonite.

As a tribe particularly reliant upon the development of its natural resource holdings to raise revenue, the Eastern Shoshone Tribe regularly is required to share confidential economic information, in the form of development agreements, with the federal government. If the proprietary information contained in those documents were available to the general public, the Tribe's ability to negotiate competitive agreements for the development of its natural resources would be significantly reduced. For the Eastern Shoshone, which funds ninety per cent of its tribal programs with revenue derived from reservation-based natural resource development, any reduction in those revenues has an immediate impact on its members, fifty-seven per cent of whom live below the poverty level.

Safeguarding the confidentiality of the information that the Tribe shares with the United States protects the Tribe's legal rights as well as its commercial competitiveness. This is especially true in the water rights adjudication that still marches on, twelve years after the Court decided *Wyoming v. United States*. The United States, which represents the Tribe's interests in that litigation,

has been engaged for years in settlement talks on the Tribe's behalf. The Tribe regularly consults with the United States regarding the nature and extent of the water rights to which it believes it is entitled. In addition, tribal personnel gather information and data for the United States' use in the litigation and settlement discussions. Tribal personnel perform this function because they are most intimately acquainted with the Reservation's geography and are most knowledgeable about the sources of such data. If the information that the Tribe provides to the United States were disclosed, the Tribe's ability to obtain a fair and equitable adjudication or settlement of its claims would be jeopardized.

The Lummi Indian Reservation, set aside by Treaty in 1855, is located along the coast of Washington State on the northern-most part of Puget Sound and the southern-most part of the Georgia Straits. Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927. The Reservation was carved out of lands inhabited by the Lummi people since time immemorial. The Lummi Nation has currently unquantified reserved rights to water to support its historical as well as future homeland needs. The Nation also has Treaty-protected fishing rights and depends on the waters surrounding the Reservation to support the fish population necessary to exercise its Treaty rights.

Water resources within the Lummi Reservation are extremely scarce. Due to man-made barriers permanently erected after the creation of the Reservation and severe surface water quality degradation, the Lummi Nation is basically cut off from access to adequate sources of surface water. As a consequence, the Nation relies primarily on groundwater resources within the Reservation. The

groundwater, however, is in scarce supply, and because of its proximity to the sea is particularly susceptible to contamination from salt water intrusion. For a number of years, the Nation has experienced conflicts with non-Indian residents of the Reservation over use of the scarce groundwater resource. The parties have attempted to negotiate a solution to those groundwater use conflicts, and the Nation has relied on the United States both to assist it in its efforts to resolve those conflicts and to protect its dwindling groundwater supply. The Nation has shared a vast amount of information with its trustee concerning the Nation's economic, cultural, and other homeland interests, including present and future development plans, land use patterns, hydrologic data, fisheries statistics and goals, and other information relevant to development of legal theories necessary to support settlement or litigation efforts by the United States to protect the trust resource. The United States would be unable to develop settlement goals or litigation strategy without this input from tribal staff. In many cases, the Nation is the only source of the necessary information.

The Pueblo of San Felipe is located in central New Mexico along the Rio Grande, approximately equidistant between the city of Albuquerque to the south and the city of Santa Fe to the north. The Pueblo is a vibrant community with a rich cultural history. It continues to occupy its aboriginal territory and maintains its centuries' old religious and cultural traditions. Since before the arrival of the Europeans in New Mexico, the Pueblo has used waters from the Rio Grande for irrigation, religious ceremonies, recreation, and other purposes. The Pueblo's identity is inextricably linked to the Rio Grande, and its

continued survival depends upon its right to those waters.

Water in the Middle Rio Grande Basin is in short supply. As the population of the American southwest continues to increase, the tension between demand for water and the available supply will become more and more pronounced. To complicate matters further, the Middle Rio Grande is the habitat of two endangered species, the silvery minnow and the southwestern willow flycatcher. The silvery minnow in particular has created enormous tensions in the Basin. *See Rio Grande Silvery Minnow v. Martinez*, No. CIV 99-1320 JP/KBM-ACE (D.N.M. July 19, 2000) (memorandum opinion and order). There is little doubt that the effort to save the fish will stretch the scarce water resources of the Middle Rio Grande Basin even further.

That effort to protect the fish also will magnify the importance of possessing valid water rights in the Middle Rio Grande. The Pueblo of San Felipe, along with the other five Pueblos located along the middle stretch of the river, has a vested right to the most senior water rights in the Basin – an aboriginal water right with a priority date of time immemorial. *State of New Mexico ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993, 1009-10 (D.N.M. 1985). *See also* Act of Mar. 13, 1928, ch. 219, 45 Stat. 312 (recognizing the Pueblos' prior and paramount water rights for certain purposes). However, because no rights to the water of the Middle Rio Grande have been quantified, an adjudication or settlement of all water rights in the river is inevitable. In that adjudication, in which the United States will be required to protect the Pueblo's right to water in the Middle Rio Grande, it will be absolutely essential that the

Pueblo be able to communicate to the United States its historical knowledge of its water use freely, without any threat of disclosure.

The Zuni Indian Tribe has a homeland in west central New Mexico that was set aside by Executive Order in 1877. Exec. Order of Mar. 16, 1877, 1877 WL 9992. From time immemorial, Zuni religious leaders have departed from the Pueblo of Zuni in New Mexico on a quadrennial pilgrimage to *Kolhu/wala:wa*, or Zuni Heaven, located in present-day Arizona. To the Zuni people, Zuni Heaven is the home of their ancestors, and ceremony associated with those lands is central to the Tribe's religious practice. After making a two-day trek on foot, Zuni religious leaders historically were greeted with a lush riparian habitat, flanked by two mountains of great religious significance to the Tribe. A sacred lake and springs provided water for sustenance and ceremony and sustained a riparian habitat that supported the growth of flora and fauna used in religious practices carried out in the years between the pilgrimages. There is no place more sacred to the Zuni people than *Kolhu/wala:wa*.

While other lands were taken from the Zuni people as the west was developed, the Tribe consistently refused to part with these sacred lands and continued to make regular pilgrimages to the area. In 1984, Congress explicitly recognized the significance of these aboriginal lands, and Zuni Heaven was restored to the Zuni people and made part of the Tribe's reservation for religious and sustenance purposes. Act of Aug. 28, 1984, Pub. L. No. 98-408, 98 Stat. 1533. Those lands are subject to an ongoing general adjudication of the Little Colorado River basin in Arizona instituted by the State. The United States

has filed claims on the Tribe's behalf in the adjudication. Those claims include claims for water for religious purposes as well as water for irrigation and other sustenance activities. To develop the Tribe's claims, the United States has relied almost exclusively on information provided by the Zuni people about their historical and religious practices in the area. Although the Tribe has been willing to share sensitive information about its religious practices as necessary to allow the United States to formulate litigation claims, the Tribe understood that the information would remain confidential and only agreed to provide the information with that understanding in mind. Likewise, within the context of the ongoing litigation, the Tribe and the United States have been negotiating a possible settlement of its claims. In its role as trustee, the United States has been privy to highly sensitive communications about the elements of a settlement essential to the religious and sustenance needs of the Tribe's religious leaders. For both settlement discussions and litigation claims development, the Tribe's communications with the United States have revealed private ceremonial information addressing water and natural resource uses critical to the Tribe's exercise of religion that otherwise would not be available to the United States or any other party.

SUMMARY OF ARGUMENT

The United States' ownership of Indian trust resources imposes legal obligations upon the federal government found nowhere else in the law. Under this historic trust relationship, the United States government has an affirmative duty to protect the natural resources that it

holds in trust for the benefit of Indian people. This obligation compels the federal government to act in partnership with the Indian tribes with whom it shares a virtually indistinguishable interest in the trust resources it is charged to protect.

When the action of a federal government agency in its regulatory role implicates trust resources, the government's fulfillment of its obligations to Indian tribes under the trust relationship requires it simultaneously to represent the interests of the tribes in the agency action to ensure that the resources held by the United States in trust for the tribes is protected. The duty imposed upon the federal government when acting in this fiduciary role is entirely separate from its duties when acting in its general regulatory role. The government agency discharging the fiduciary role engages in advocacy on behalf of Indian tribes to protect the resources that the United States holds in trust for them. In fulfilling that obligation, it has none of the decision-making responsibilities that characterize the federal government's regulatory role.

Because the purpose for which the federal government obtains information from Indian tribes to assist the government in carrying out its fiduciary obligation to protect the tribes' trust resources in an agency regulatory proceeding is plainly deliberative, that information is not subject to release under Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). Indian tribes provide such sensitive information only because the federal government, as trustee of the tribes' natural resources, is obligated to protect those resources for them. Without the information, the federal government would be unable to

protect the resources properly, a result that Indian tribes cannot afford.

ARGUMENT

THE TRUST RELATIONSHIP BETWEEN THE UNITED STATES GOVERNMENT AND INDIAN TRIBES PROVIDES THE PROPER CONTEXT FOR RESOLUTION OF THIS DISPUTE

Under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, proper analysis of the documents at issue in the instant case requires a proper recognition and understanding of the context within which the Klamath Basin Tribes provided the documents to the Petitioners. The federal government's trust relationship with Indian tribes provides that context. The trust relationship, which has evolved over the course of almost two centuries and "has long dominated the Government's dealing with Indians," occupies a prominent place in the jurisprudence of this Court. *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (citing cases). The trust relationship imposes upon the federal government a fiduciary duty in its dealings with Indians and Indian tribes, particularly with regard to the land, water, and other natural resources that the United States holds in trust for the benefit of Indian people. The duty is a "self-imposed" one that arises out of the Indian tribes' status as "dependent domestic nations" within the territory of the United States. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

A. The United States' Fulfillment Of Its Obligations Under The Trust Relationship Requires That Communications Between It And Indian Tribes Regarding The Protection And Management Of Trust Resources Be Confidential.

The subject matter of the communications between the federal government and Indian tribes *within the confines of the trust relationship* compels the need for confidentiality. This is especially true when those communications concern the protection and management of the trust resources to which the United States holds legal title for the benefit of Indian tribes and individual Indians. The United States' ownership of Indian trust resources imposes legal obligations upon the federal government found nowhere else in the law. So intertwined are the interests of the United States and Indian tribes in those resources that encroachment upon them "is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States." *Heckman v. United States*, 224 U.S. 413, 438 (1912). A duty of "complete representation" thus devolves upon the federal government to protect trust resources regardless of whether an Indian tribe or individual Indian even desires such protection. *Id.* at 444-45; *United States v. Truckee-Carson Irrigation Dist., State of Nev.*, 649 F.2d 1286, 1297-1301 (9th Cir. 1981), *aff'd in part, rev'd in part sub nom. Nevada v. United States*, 463 U.S. 110 (1983). Although the federal government's representation of Indian property interests "does not depend upon the Indians' acquiescence," the outcome effectively binds the tribe whose resources are the subject of the representation. *Heckman*, 224 U.S. at 445. *See also Nevada v. United States*, 463 U.S.

110, 135 (1983); *Arizona v. California*, 460 U.S. 605, 618-19 (1983).

The United States' obligation to the users of federal reclamation project water, such as Respondent's members, does not find its source in any fiduciary duty and is therefore significantly different. The right of such water users is based entirely on the extent of the water right granted them in the water delivery contracts to which they are parties. *Ickes v. Fox*, 300 U.S. 82 (1937); *Barcellos and Wolfsen, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 731 (E.D. Cal. 1993), *aff'd sub nom. O'Neill v. United States*, 50 F.3d 677 (9th Cir.), *cert. denied*, 516 U.S. 1028 (1995). One leading case aptly describes the contractual nature of the reclamation water user's right:

> A distinction must be recognized between the nature of nonproject water, such as natural-flow water, and project water, and between the manner in which rights to use of such waters are obtained. Right to use of natural-flow water is obtained in accordance with state law. In most western states it is obtained by appropriation putting the water to beneficial use upon lands. Once the rights are obtained they vest, until abandoned, as appurtenances of the land upon which the water has been put to use. Project water, on the other hand, would not exist but for the fact that it has been developed by the United States. It is not there for the taking (by the landowner subject to state law), but for the giving by the United States. The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix. If such rights are subject to becoming vested beyond the power of the United States to take without just compensation, such vesting can only occur on terms fixed by the United States.

Israel v. Morton, 549 F.2d 128, 132-33 (9th Cir. 1977) (footnote omitted). The distinction between the federal government's trust obligation to Indian tribes and its contractual obligation to reclamation water users, and the manner in which those competing obligations inform the relationships of the respective parties with the federal government, lies at the heart of the dispute before the Court.[2]

Petitioner Department of the Interior ("DOI"), consisting of eight component agencies, is charged by Congress with numerous, often conflicting, statutory responsibilities respecting our country's natural resources. Although "any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian Tribes," *Nance v. E.P.A.*, 645 F.2d 701, 711 (9th Cir.),

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[2] Congress has recognized and reaffirmed the principle that the federal government's relationship with Indian tribes is unlike no other, and that the communications that take place within the confines of that relationship occupy a special status in the law. For example, 31 U.S.C. § 1352 (Supp. 2000), enacted in 1989 to prohibit the use of funds appropriated by Congress "by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress," *id.* § 1352(a)(1), specifically excludes from the statute's broadly inclusive definitions of "recipient" and "person" only "Indian tribe[s], tribal organization[s], or any other Indian organization eligible to receive Federal contracts, grants, cooperative agreements, or loans." *Id.* §§ 1352(g)(1) & (3).

cert. denied, 454 U.S. 1081 (1981) (citing *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)), only one of the DOI's component agencies, Petitioner Bureau of Indian Affairs ("BIA"), has directly been "charged with fulfilling the trust obligations of the United States" to Indians. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 374 (1968). Because any number of the DOI's myriad responsibilities can arise in connection with a single issue facing the Department, it is not uncommon for the BIA's fulfillment of the trust obligation to be inconsistent with the competing responsibilities of other DOI component agencies (and for the competing responsibilities of the other DOI component agencies to be inconsistent as well with one another). The backdrop against which the Klamath Basin Tribes provided the disputed documents to the BIA illuminates just such a situation.

That backdrop is the DOI's development of the Klamath Project Operations Plan ("KPOP"). Development of the KPOP required the participation of at least three of the DOI's component agencies fulfilling three distinct roles. First, the Bureau of Reclamation ("BOR"), as the component agency responsible for the operation of reclamation projects, *see* 43 U.S.C. § 373a (1986), itself initiated the administrative process aimed at developing the KPOP. As parties with rights to water in the Klamath Basin, both the Klamath Basin Tribes and the Respondent's members participated in that process. Second, because the development of the KPOP raised issues concerning certain threatened or endangered fish species, the participation of the U. S. Fish and Wildlife Service ("FWS"), as the component agency responsible for the implementation of the Endangered Species Act ("ESA"),

see 16 U.S.C. §§ 1531-1544 (1985 & Supp. 2000), was required. Its role, of course, was to ensure that the development, and ultimately the implementation, of the KPOP proceed in accord with the requirements of the ESA. Third, because the development of the KPOP implicated the water resources held in trust for the Klamath Basin Tribes by the United States, the participation of the BIA, as the component agency directly responsible for fulfilling the federal government's trust obligation to Indian tribes, also was required. The BIA's only role was to protect the water resources of the Klamath Basin Tribes. Put another way, the extent of the BIA's role in the development of the KPOP was delimited by *the confines of the trust relationship*.

The DOI's varying obligations to Indian tribes and reclamation water users is reflected in the roles of the BOR and BIA in the KPOP administrative process. As the lead agency solely responsible for the development and ultimate adoption and implementation of the KPOP, the BOR was exercising the DOI's general regulatory role. In that role, the BOR's obligation is to treat all parties with rights to water in the Klamath Basin, including the Klamath Basin Tribes (and the BIA on behalf of the Tribes) and Respondent and its members, as coequal participants in the administrative process. In contrast, the BIA, as the component agency "charged with fulfilling the trust obligations of the United States," was specifically exercising the DOI's fiduciary role. That role, which springs out of the trust relationship, is distinct from, but necessarily informs, the regulatory role. *See Joint Bd. of Control of Flathead, Mission and Jocko Irr. Districts v. United States*, 832 F.2d 1127, 1131-32 (9th Cir.

1987), *cert. denied*, 486 U.S. 1007 (1988) (distinguishing the BIA's regulatory role in managing a reservation-based irrigation project "in fairness to all irrigators," Indian and non-Indian alike, from its fiduciary role "in helping the [Confederated Salish and Kootenai] Tribes to protect their prior and paramount fishing water rights"); *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1566-67 (10th Cir. 1984) (Seymour, J., dissenting), *dissenting opinion adopted as majority opinion as modified*, 782 F.2d 855 (10th Cir.) (en banc), *cert. denied*, 479 U.S. 970 (1986) (concluding that the Secretary of the Interior "cannot escape his role as trustee by donning the mantle of administrator"). In the fiduciary role, the BIA was acting *within the confines of the trust relationship*. Its sole obligation was to work with and represent the interests of the Klamath Basin Tribes to ensure that the resources held by the United States in trust for the Tribes would be protected in the BOR's development of the KPOP. The BIA played no regulatory role in the KPOP administrative process.

The ability of the federal government to fulfill its fiduciary obligation depends upon the maintenance of a close and confidential working relationship with Indian tribes. Confidentiality has always been the hallmark of the trust relationship. Indeed, from the perspective of *amici*, without assurances that their communications with the federal government, particularly the BIA, *within the confines of the trust relationship* are confidential, the very existence of the trust relationship itself is cast into doubt.

B. When Analysis Of The Documents At Issue Under The FOIA Is Properly Informed By The Trust Relationship Between The United States Government And Indian Tribes, Those Documents Come Squarely Within The Scope Of FOIA Exemption 5.

Once it is understood that the Klamath Basin Tribes provided the disputed documents to the BIA *within the confines of the trust relationship*, and that the BIA used the documents in preparing to discharge the federal government's trust obligations to the Tribes in the KPOP administrative process and the Oregon water rights adjudication, that the documents should have been exempt from disclosure under Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), seems a foregone conclusion.

Even given that "[t]he mandate of the FOIA calls for broad disclosure of Government records," *C.I.A. v. Sims*, 471 U.S. 159, 166 (1985), the statute was never intended, nor has it ever been interpreted, to require the disclosure of materials in possession of a government agency that falls within one of the nine exemptions listed in section 552(b). *See United States v. Weber Aircraft Corp.*, 465 U.S. 792, 793-94 (1984). Congress included the exemptions in the FOIA because it "realized that legitimate governmental and private interests could be harmed by release of certain types of information. . . . " *F.B.I. v. Abramson*, 456 U.S. 615, 621 (1982).

In an official Department of Justice ("DOJ") Memorandum to the heads of executive branch departments and agencies, Attorney General Reno recently declared that "the principle of openness in government" is best served "by achieving the [FOIA]'s primary objective –

maximum responsible disclosure of information – while preserving essential confidentiality." MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES REGARDING THE FREEDOM OF INFORMATION ACT, Office of the Attorney General 1 (Oct. 4, 1993). *Amici* assert that the disclosure under the FOIA of the disputed documents in this case, obtained as they were by the BIA from the Klamath Indian Tribes in furtherance of the federal government's obligation to protect the Tribes' trust resources in the KPOP administrative process and the Oregon water rights adjudication, would cross the line from "maximum responsible disclosure" to grossly irresponsible disclosure because the documents were exchanged *within the confines of the trust relationship*: the documents contained sensitive information that the Tribes provided to the BIA only because the federal government, as trustee of the Tribes' natural resources, was obligated to assert and protect the Tribes' interest in those resources; but for the federal government's obligation, arising out of the trust relationship, the Tribes would have had no reason to provide the disputed documents to the BIA. Moreover, without the information contained in the documents, the BIA would be unable to fulfill properly the federal government's trust obligation to protect the Tribes' resources.

In short, the BIA's decision not to release the disputed documents, and the DOJ's subsequent defense of that decision, is consistent both with the trust obligation and the policy of the DOJ respecting its defense of FOIA nondisclosure decisions. *See id.* ("[I]t shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to

an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be."). Here, where the Klamath Basin Tribes provided sensitive information to the BIA, at the agency's request, essential to the federal government's protection of the Tribes' trust resources and development of tribal litigation claims, disclosure will most certainly harm the Tribes' and federal government's shared interests.

That the interests of the federal government and Indian tribes in the subject matter of the trust relationship are so closely aligned as to be identical also compels the conclusion that the disputed documents fall within Exemption 5 of the FOIA. "Exemption 5's purpose of protecting the Government's deliberative process is plainly applicable" to information that the BIA obtains from an Indian tribe for use in carrying out the federal government's obligation to protect the property that the United States holds in trust for the tribe's benefit. *United States Dept. of Justice v. Julian*, 486 U.S. 1, 19 n.1 (1988) (Scalia, J., dissenting). *Amici* urge the Court to adopt Justice Scalia's explication of the term "intra-agency memorandum" in Exemption 5 as the proper point of departure for analysis of the applicability of that exemption to documents originating from outside an agency:

> It is textually possible and much more in accord with the purpose of the provision, to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other

> than on behalf of another agency – e.g., in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency.

Id. This interpretation of the scope of Exemption 5, which properly focuses on the agency's use of the information that it receives, recognizes the reality that certain information integral to the performance of a federal government agency's functions is often obtainable only from persons outside of the agency. Under no circumstances is this reality more true than in the BIA's performance of its functions *within the confines of the trust relationship*. There, the interests of the United States and Indian tribes are so intertwined in the land, water, and other natural resources that the United States holds in trust for the benefit of the tribes that the BIA's failure to consult with Indian tribes regarding the protection of those resources would leave the agency unable to fulfill the United States' trust obligations.

CONCLUSION

The issue in this case is whether the community of interests that the United States and Indian tribes share in the subject matter of the trust relationship – the natural resources that the United States holds in trust for the benefit of Indian people – bestows upon Indian tribes the type of "governmentally conferred capacity" that brings within the ambit of FOIA Exemption 5 information concerning the protection of those trust resources provided

by Indian tribes to the federal government at the government's request. To say that it does not fails to recognize the fundamental distinction between Petitioners' obligations to Indian tribes *within the confines of the trust relationship* and their obligations to all others. The long-term result of such a failure would be to end the open and candid exchange of views and information between Indian tribes and the federal government that is essential to the government's discharge of the trust obligation. For all of the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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